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.

April 27, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 8, 2005

Case Number: TSO-0262

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization 1/ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should be granted.

I. Background

The individual's employer, a contractor at a Department of Energy (DOE) facility, requested an access authorization for the individual. During a background investigation, the local DOE security office discovered derogatory information that created a security concern. DOE asked the individual to participate in two Personnel Security Interviews (PSIs) in order to resolve the information. The PSIs did not resolve the security concerns.

The local DOE security office issued a Notification Letter to the individual on November 3, 2004. The Notification Letter alleges under 10 C.F.R. § 710.8(f) that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive Positions, Personnel Qualifications Statement, a Personnel Security Interview, written or oral statements made in response to an official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization. . . ." It also alleges that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interest of the national security." 10 C.F.R. § 710.8(l).

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing on the concerns raised in the Notification Letter. DOE transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case.

At the hearing that I convened, the DOE Counsel elected to call two witnesses, both personnel security specialists (DOE PSS #1 and #2). The individual testified on his own behalf and elected to call a co-worker as a witness. The transcript taken at the hearing shall be hereinafter cited as "Tr." Documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex."

II. Standard of Review

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). 10 C.F.R. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

When reliable information reasonably tends to establish the validity and significance of substantially derogatory information or facts about an individual, a question is created as to the individual's eligibility for an access authorization. 10 C.F.R. § 710.9(a). The individual must then resolve that question by convincing the DOE that granting his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). In the present case, the individual has convinced me that granting his security clearance would not endanger the common defense and would clearly be in the national interest. The specific findings that I make in support of this determination are discussed below.

III. Findings of Fact

During the course of two PSIs conducted on April 16, 2004 and May 5, 2004, the individual admitted that he was involved in an incident in 1994 with the police while driving away from a barbershop with some friends. The individual was 18 years old at the time. According to the individual, he was pulled over by the local police for driving 47 mph in a 35 mph zone. All of the passengers of the car

were searched. The individual claimed that the police officer told him that he was "resisting arrest" and he was "wrestled to the ground." The individual accepted a plea bargain. He served one year of unsupervised probation and paid a $100 fine.

During these two PSIs, the individual also claimed that someone had stolen the hubcaps from his car while he was parked on the campus of a local university which he was attending in 1997. The individual states that a friend spotted a car with the individual's hubcaps on its wheels. After being informed of this car's location, the individual drove to the parking lot where he removed the hubcaps, damaging two of them. According to information in the individual's background investigation, the campus police stopped the individual as he was leaving the parking lot with three hubcaps and his car lights turned off. The individual was issued a citation for the theft of one hubcap. No fine was imposed on the individual. However, he was placed on one year of probation.

During the May 5, 2004 PSI, the individual admitted that while he was employed with a local department store in 1996 or 1997 he allowed friends and family to use his employee discount. According to the individual, he was unaware of the company's policy prohibiting this practice. The individual states that the company gave him the option of remaining employed under a three-months probation or leaving the company. In light of the fact that he was a temporary employee, the individual states that he chose to leave the company.

In addition, during both of his PSIs, the individual was questioned about his employment with and departure from a security company in December 1999. During these interviews the individual stated that he was accused of breaking into a desk drawer in order to get a computer keyboard and watching pornography with a friend while he was on duty. The individual was reprimanded for not telling his company management that he watched TV, particularly pornography, while on duty. He stated that his company offered him the opportunity to either change shifts or find other employment. However, the primary investigative source of information about the individual's tenure at the company stated that the individual was immediately terminated after he was interviewed about the pornography incident.

After discussing his departure from the security company during his April 16, 2004 PSI, the individual was asked if he had been terminated or left other employment under unfavorable conditions. The individual responded "No." However, when confronted with information from the Background Investigation that he was terminated on March 5, 1999, from his job as a student driver, the individual stated that he had only been placed on extended leave and that was the reason he did not list termination from the job on his November 7, 2002 Questionnaire for National Security Positions, Standard Form 86 (SF-86).

The Notification Letter also alleges that during the individual's Background Investigation, the individual admitted that he had been suspended as a student from a local university during the fall semester of 1999 for having an excessive number of parking tickets. In addition, when asked about his 2003 employment application with a local police department during his May 5, 2004 PSI, the individual stated that he had been denied employment because of his failure to provide truthful answers to one of the questions on the application concerning his convictions and arrests.

In addition to the above occurrences, the Notification Letter alleges that the individual misrepresented or omitted the following information on his Questionnaires for National Security Positions (QNSP) Standard Form 86 (SF-86) he signed on October 2, 2001 and November 7, 2002 and his Employment Questionnaire he signed on October 3, 2002:

1. The individual failed to indicate his 1994 arrest on a November 7, 2002 SF-86 by answering "No," to a question which read "In the last 7 years, have you been arrested for, charged with, or convicted of any offenses . . ." In addition, the individual failed to indicate the arrest on his October 3, 2002 Employment Questionnaire and his October 2, 2001 SF-86.

2. The individual failed to show his departure under unfavorable conditions from employment at a local department store on his November 7, 2002 SF-86 and on his Employment Questionnaire.

3. The individual did not list his 1999 termination from employment with the university Transit System Shuttle on his Employment Questionnaire.

4. The individual failed to show his departure under unfavorable conditions from a security company on his November 7, 2002 SF-86 and his October 3, 2002 Employment Questionnaire.

IV. Analysis

A. Security Concerns Cited Under 10 C.F.R. § 710.8(f) and (l)

False statements or misrepresentations by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when an access authorization holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g.*, *Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995) (*affirmed* by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, *Personnel Security Review* (Case No. VSA-0281), 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000). This security concern applies, however, only to misstatements that are "deliberate" and involve "significant" information. 10 C.F.R. § 710.8(f) (Criterion F). Based on the record before me, I find that the individual deliberately misrepresented significant information on his Employment Questionnaire and QNSPs. Consequently, DOE properly invoked Criterion F in this case.

I also find that the DOE properly invoked Criterion L. As discussed above, the DOE must be able to rely on persons who are granted access authorization to be honest and reliable. Criterion L relates to information indicating that an individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of national security. 10. C.F.R. § 710.8(l). In the present case, the DOE cites the various incidents where the individual failed to obey laws and follow rules and regulations as well as the individual's apparent dishonesty regarding those incidents.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing* (Case No. VSO-0244), 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff'd, Personnel Security Review* (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). OHA Hearing Officers are regularly called upon to decide whether an individual with an alcohol problem has mitigated the security concern. Cases involving verified falsifications or misrepresentations are nonetheless difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from lying nor formal self-help or self-awareness programs to which an individual can turn in order to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statements and the individual's subsequent history, including testimony in a hearing, in order to assess whether the individual has rehabilitated himself from the falsehood and whether granting the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd, Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (affirmed by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). In the end, as a Hearing Officer, I must exercise my common sense judgment whether the individual's access authorization should be granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c).

B. Mitigation of Criteria F and L Concerns

At the hearing, the DOE PSS # 1 testified that the individual has shown a pattern of dishonesty from age 18 to 27. Tr. at 27, 28. However, DOE PSS #2 testified that there were some mitigating factors in the individual's favor. According to DOE PSS #2, the individual listed on some of his security paperwork and employment application his 1994 arrest, two terminations from previous employers and the fact that he was denied employment with a local police department. Nonetheless, because the individual did not list this information on all of his security forms, DOE Security could not resolve the issues in the individual's favor. The key issue in this case is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. Based on the evidence in the record, particularly the individual's testimony during the hearing and the testimony of PSS #1 and #2, I find that the individual has brought forward sufficient evidence to mitigate the Criteria F and L security concerns.

During the hearing, the individual attempted to explain the incidents outlined in the Notification Letter. With respect to the stolen hubcap incident, the individual testified that "friends witnessed someone taking the hubcaps and I . . . in bad judgment, went to retrieve them later on and I got it back, but I was caught taking one hubcap." Tr. at 29. The individual was 20 years old at the time and a student at a local university. He further testified that with respect to the department store "employee discount" incident, he was not aware that there was a limit on how much of the discount family and friends could use. *Id.* The individual stated that he was not fired but chose to leave this job. During this time period the individual was a seasonal employee and a junior in college. The

individual was 19 or 20 years old at the time. 2/ With respect to the "pornography viewing" incident at a previous employer, the individual testified that it was his friend who accessed the computer, not he. However, the individual admitted to looking at the pornographic material for approximately two or three minutes and then shutting the computer down. *Id.* at 31. The individual stated that he was 22 years old at the time. He also admitted that he was suspended for a semester from his university for excessive parking tickets. The individual testified that "in hindsight . . . I should have paid the meter, but I was trying to get to class and get to my job and I didn't take the responsibility to put money in the meter." *Id.* at 33. He testified that the parking tickets were all paid in full. Finally, the individual clarified that he was not terminated from employment by the university transit shuttle, but rather he was suspended from his driving privileges. *Id.* at 33-35 He testified that "I couldn't drive as a student, but [I was] still employed under the shuttle transit system to do other things . . . bus washes, bus maintenance." *Id.* at 35.

The individual also testified about the misrepresentations and omissions on his November 7, 2002 SF-86 and an October 3, 2002 Employment Questionnaire. He would have been approximately 23 or 24 when he completed this paperwork. The individual admitted that he should have been more forthcoming in his disclosures and testified that in some instances he did not understand the questions. Tr. at 51. He testified that "I know some of the things seem to be a little shaky, but in retrospect, some of the things I should have put down, and others I just really did not understand as far as the question and the wording to put down. But in a lot of the things, I will say that I should have put down a lot more than what was on those papers. And I'm sorry if I did cloud anything or bring suspicion or anything as far as my honesty and truthfulness." *Id.* at 52.

The individual further testified that when answering the questions in the security paperwork, he wrongly followed the advice of others at his workplace who, for example, advised that the individual had to only disclose felonies and not misdemeanors. *Id.* at 66. He admitted that following this ill advice was wrong and fully accepts the responsibility for his misrepresentations and lack of full disclosure. He testified convincingly that he has matured significantly over the past five years and understands the consequences of his dishonesty. *Id.* at 52. 3/ He further testified that he did not intend to misrepresent any information. *Id.* at 66. When asked whether he could be blackmailed or coerced into doing anything based on the information about him or in his past, the individual

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2/ The individual was 18 years old at the time of his 1994 arrest. He listed this arrest on his SF-86 and employment application. Although cited in the Notification Letter, this arrest did not cause DOE Security great concern by itself. However, it was included to show that the individual has been involved in a series of unfavorable incidents over a period of time. Tr. at 11, 14.

3/ The individual called a fellow co-worker and friend as his witness. This co-worker testified that he has known the individual for approximately three years. He considers him to be a good employee who has a good rapport with all of his co-workers and supervisors. As a union representative counselor, this co-worker testified that he knows of no negative instances on the job involving the individual's behavior or demeanor. Tr. at 56. He further testified that the individual has matured a great deal over the last several years, noting that the individual has purchased his own home. *Id.* at 60. I found this witness to be highly credible.

responded "No." *Id.* He reiterated that he has grown since these incidents occurred and now fully understands what his responsibility is in completing security paperwork, i.e., full disclosure. *Id.* at 68-70.

After the individual's testimony, the DOE Counsel asked the Personnel Security Specialists if any of the issues in the Notification Letter have been resolved. DOE PSS #1 stated the following: "It's possible. However, he [the individual] has to look, for the future, to make sure that if in fact he is asked again to complete some of these documents, that he discloses what's required." Tr. at 71. DOE PSS #2 concurred and stated the following:

> I agree with [PSS #1]. I think there are some mitigating factors here. Granted, yes, most of this happened in your youthful years. [The individual's co-worker] testified you have matured greatly within the last three years that he's known you. However, I agree with [PSS #1]. The next time your reinvestigation comes up, in reviewing this security paperwork, I guess my question to you is - - you said you would err on the side of full disclosure. Is that how you feel? Would you put down the information if it does fall within the time period that's required, . . .

Id.

In response to DOE PSS #2, the individual stated that he would not attempt to use a questionable interpretation when answering questions on his security paperwork, but he would answer exactly what is asked of him. *Id.* at 72. DOE PSS #2 reminded the individual that when completing security paperwork in the future the individual should contact someone within DOE security if he has any questions rather than relying on others to help him complete any forms. *Id.*

After considering all the evidence before me, I believe the individual has sufficiently mitigated the security concerns arising from his misrepresentations and the incidents outlined in the Notification Letter. First, I find the concerns arising from most of the incidents cited under Criterion L be to mitigated by the individual's age and maturity at the time of the conduct. Second, I find the individual's explanations for the incidents in his past and for his misrepresentations to be credible and persuasive. He did not appear to be hiding any information in his background as he credibly and calmly discussed each incident during his testimony. The individual shows deep regret for these misrepresentations and omissions. I am convinced by the testimony in the record that the individual now fully understands that he should err on the side of full disclosure. I am also convinced that the individual has matured greatly and has learned from his past mistakes. It is important to note that the individual did not omit or misrepresent all of the information in his background, rather he did not consistently disclose all relevant information on every security form or application he completed. Moreover, it is unlikely that the individual is vulnerable to blackmail or coercion regarding the issues in his past. In exercising my common-sense judgment based on the testimony and evidence in record, I believe the likelihood is small of continuation or recurrence of the individual's conduct. Third, I am persuaded by the testimony of the DOE Personnel Security Specialists that there are mitigating factors here in the individual's favor. For instance, both agree that the incidents in the individual's background occurred during his "youthful years." Further, both Specialists advised the

individual on how to complete the security paperwork in the future. Thus, I will infer that the Personnel Security Specialists are also persuaded that the individual has learned from his past deeds and will use better judgment in the future under similar circumstances. Accordingly, I find that the individual has sufficiently mitigated the security concerns raised by Criteria F and L.

V. Conclusion

As explained in this Decision, I find that the DOE properly invoked 10 C.F.R. § 710.8(f) and (l). However, I find that the individual has presented adequate mitigating factors that would alleviate the legitimate security concerns of the DOE Operations Office. In view of these criteria and the record before me, I find that the individual has demonstrated that granting his access authorization would not endanger the common defense and would be consistent with the national interest. Accordingly,
I find that the individual's access authorization should be granted. The Office of Security may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: April 27, 2006